IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1967

No. 247

THE PUYALLUP TRIBE, a Federal Organization,
Petitioner,

v.

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON

AND THE

DEPARTMENT OF FISHERIES OF THE STATE OF WASHINGTON,
Respondents.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF WASHINGTON

BRIEF FOR THE RESPONDENTS

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Attorney General,

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QUESTIONS PRESENTED

I. **Does Article 5 of the Treaty of Medicine Creek Operate As a Reservation of Sovereign Rights or Immunities for the Petitioners From the Application of Valid State Conservation Laws?**

II. **Does the Puyallup Indian Reservation Legally Exist?**

III. Does An Indian Tribe Possess Immunity From Suit Over Issues Involving Off-Reservation Property Rights?

IV. Is a Declaratory Judgment Action the Proper Procedure to Test What Rights, If Any, Petitioners Possess?

V. Does the United States Have Any Authority to Regulate Off-Reservation Indian Fishing?

THE TREATY AND STATUTES INVOLVED

The treaty involved is known as the Treaty of Medicine Creek, 10 Stat. 1132.

The statutes involved are those of the State of Washington concerning fishery resource conservation by regulation of the time, place and manner of fishing. Anadromous fish are the subject matter of this litigation. The conservation or management responsibilities for anadromous fish has been legislatively defined to include all species of salmon as food fish and steelhead trout as game fish[1]. State laws most often violated by Indians claiming off-reservation fishing rights are: Revised Code of Washington 75.12.060 (hereinafter referred to as RCW):

> "It shall be unlawful to construct, install, use, operate, or maintain within any waters of the state any pound net, round haul net, lampra net, fish trap, fish wheel, scow fish wheel, set net,

[1]The Department of Game has management responsibility for steelhead trout and the Department of Fisheries for salmon and shellfish. RCW Titles 75 and 77. Food Fish (i.e., salmon species) may be dealt with commercially while steelhead trout may not. Salmon may be taken with commercial gear (nets) in salt water under regulations promulgated by the Department of Fisheries. Steelhead trout may only be taken by hook and line under regulations promulgated by the Department of Game.

weir, or any fixed appliance for the purpose of catching salmon, and it shall be unlawful to take salmon by any such means."

RCW 75.12.280:

"It shall be unlawful for any person to install, use, operate, or maintain within any waters of the state any monofilament gill net webbing of any description for the purpose of catching salmon, and it shall be unlawful to take salmon by any such means or with such gear."

RCW 77.16.060:

"It shall be unlawful for any person to lay, set, use, or prepare any drug, poison, lime, medicated bait, nets, fish, berries, formaldehyde, dynamite, or other explosives, or any tip-up, snare or net, or trot line, or any wire, string, rope, or cable of any kind, in any waters of this state with intent thereby to catch, take or kill any game fish. It shall be unlawful to lay, set or use a net capable of taking game fish in any waters of this state except as permitted by regulation of the department of fisheries: *Provided*, That persons may use small landing nets or under written permit issued by the director may use nets or seines in the taking of non-game fish.

"Any person violating any of the provisions of this section is guilty of a gross misdemeanor and shall be punished by a fine of not less than two hundred fifty dollars and not more than one thousand dollars or by imprisonment in the county jail for not less than thirty days and not more than one year or by both such fine and imprisonment."

STATEMENT OF THE CASE

The State of Washington has an extensive statutory and regulatory system for conserving and perpetuating its fishery resources while at the same time

permitting a maximum utilization by both sport and commercial fisheries. In order to achieve the goal of maximum utilization, the state has gone far beyond mere enactment and promulgation of restrictions on fishing activities, although this is an essential management tool. The state has expended large sums of public monies: (1) to develop natural spawning and rearing areas through stream clearance projects; (2) for construction and operation of many hatcheries, spawning channels and rearing stations; (3) for construction of fish passage facilities over hydroelectric projects, irrigation projects and other obstacles in our river systems; and (4) to establish research staffs of fishery biologists qualified to study and make recommendations concerning problems of the anadromous fishery resource including pollution problems.

For example, both the departments of game and fisheries maintain hatcheries on the Puyallup River system (A. 113, 142) and have, in the past, conducted an extensive planting program on the system (A. 142).

While the salmon are located in salt water, they are subject to efforts by commercial and sport fisheries to reduce them to a captive status. These fishing efforts are conducted along the coasts of Alaska, British Columbia, Washington, Oregon and California by persons of various nationalities. These activities outside national boundaries are conducted under regulations adopted pursuant to international agreements.

Within the territorial limits of Washington state, commercial fishing for salmon is governed as to time, area and gear by state laws and regulations. Those laws and regulations completely prohibit net fisheries in all rivers and streams within the state. The Puyallup River is therefore closed to net fishing. In addition, Commencement Bay, into which the Puyallup River flows, has been designated as a salmon preserve and has been closed by the Department of Fisheries to all commercial net fishing (A. 667).

Prior to 1953, no open net fishery existed in the Puyallup River (R. 459). In that year certain of the petitioners utilized set gill nets near the mouth of the Puyallup River where it empties into Commencement Bay and commercially disposed of salmon which they caught.

A set gill net, commonly referred to as a set net, is a gill net of single web construction which is laid out in the water and is either tied or anchored at both ends of the net, thus holding it in a fixed position. Gill nets are also used in the legal saltwater drift net fishery by commercial fishermen. The nets used in the drift net fishery are regulated as to type of construction, mesh size, length, depth, areas and times where they may be used. The set gill nets, utilized by petitioners, have not been regulated or limited in any of the respects noted above (R. 465-534).

The set net fishing activities of petitioners resulted in criminal charges being filed which culmi-

nated in *State v. Satiacum*, 50 Wn.2d 513, 314 P.2d 400 (1957). After the four-four split decision of the Washington Supreme Court in that case, petitioners greatly increased the intensity of their set net fishery in the Puyallup River and Commencement Bay. At all times anadromous fish were migrating to their spawning grounds in the Puyallup River, the petitioners have pursued their commercial fishing activities with both set nets and drift nets on a seven day per week, twenty-four hour per day basis. The fishing gear utilized by petitioners effectively blocked passage of anadromous fish ascending the Puyallup River.

Due to petitioners' intensive and unregulated fishing effort, insufficient numbers of adult spawners have reached the spawning grounds and state hatcheries to perpetuate the runs and races of anadromous fish of the Puyallup River.

Five species of anadromous fish are found in the river; four are salmon (chinooks, silvers, chums and pinks) and one variety of trout (steelhead) (A. 123).

Anadromous fish are those which spawn in fresh water, migrate to salt water to mature and then return to fresh water to start the cycle again. Adult salmon die after spawning, steelhead do not necessarily do so (A. 137).

The fish deposit their eggs in the riverbed gravel in late fall and winter. The eggs remain until they hatch and the young swim up from the gravel. Pink

and chum salmon fry immediately leave the stream and move to the sea (A. 124). Chinook fry remain in the stream for about 60 to 90 days and then move to sea. Silver salmon fry remain in fresh water for one year, then migrate to sea (A. 125). Young steelhead spend about two years in fresh water before they migrate to sea (A. 137).

Each species spends a different length of time in salt water, continuing their growth. Pinks return to the streams to spawn after two years at sea (always in odd-numbered years in Puget Sound); chums return in three or four years; chinook anywhere from two to five years; and silvers remain at sea two or three years (A. 125). Steelhead return after two to four years (A. 137).

Each species of anadromous fish consists of various distinct races (A. 156) segregated according to river system and the time of their return to their natal river from the sea. Each race must be managed independently of each other. For example, the Puyallup River contains several races of chinook and each utilizes a different portion of the stream for spawning (A. 156).

As stated by Dr. Richard Van Cleve, Dean of the College of Fisheries of the University of Washington:

> "(T)he escapement has to be very delicately balanced to allow escapement to all parts of each race, because each race consists of what we call in genetics, a gene pool, which is actually the basis for the genetic inheritance of a particular race or particular population." (A. 157, 8)

The basic conservation management theory for regulating fishing effort is to remove fish from the overall population and not completely remove any one race or genetic entity. This allows "a portion for escapement from all parts of this particular, of each particular race." (A. 158)

The term "conservation" does not mean saving fish or preventing all fishing effort,

> "It means the development of the runs and speaking particularly with respect to salmon. But it also holds true with respect to all other species too.
>
> "They obtain the maximum catch, that is, the population that each population is capable of producing, and this is the means that we should have maximum utilization of all the facilities and the spawning areas of the salmon." (A. 162)

As the various runs return from their ocean "pasture" to spawn, they are subjected to fishing effort. The basic aim is to regulate that effort so that the resource is harvested in such a way that only a portion of each population is removed (A. 85).

This process was described by the Assistant Director of the Department of Fisheries, J. E. Lasater, as follows:

> "Q. Now, I believe on your cross examination you testified that the regulation of the upstream migrants or adult fish, as they began their migration to the stream of origin from the ocean, I believe you said 'more significant' or 'more critical' or something along this line; is that correct?
>
> "A. Yes.

"Q. Could you explain what you meant when you testified that this is of such importance to you as Assistant Director of the Department of Fisheries, and as a biologist?

"A. As the fish come through the fishery, you assess the size of the run in the general area, then you take a look at the regulations that you already have in effect, and judge whether they are going to be sufficient to guarantee a spawning escapement to this stream in general. Then as the run approaches closer to the particular stream, we have the Puget Sound divided into various fishing areas, and if the run to a particular stream, or group of similar streams and area, appears to be lower than the average that we have been looking at, then further restrictions will be placed in the particular areas which will affect those particular streams.

"So that as the fish approaches the stream our knowledge of the precise run to that stream gets better and better, and we can more intelligently and accurately regulate it,—regulate that particular run, as it splits off from the other runs.

"Q. Do you consider it important to have control over any fishing effort which is made upon the stocks at this point in their migration?

"A. It is important if the stream is going to be held near or at its maximum potential production for endless years to come." (A. 89, 90)

It is of vital importance for the protection of the runs that the total fishing effort be controlled. To put it another way, the resource is subject to destruction, if a net fishing effort in Commencement Bay and the Puyallup River is allowed to exist at all, even though there are prohibitions as to time and gear in Puget Sound. It is probable that races

of the total population of the Puyallup will be destroyed if a net fishery is permitted.

Lasater stated:

"Q. In your opinion, Mr. Lasater, is the Indian fishery in the Commencement Bay and Puyallup area a significant cause for the decline of the salmon stocks of the Puyallup River system?

"A. Yes, it is a significant cause.

"Q. Over and above these other mortality factors?

"A. Yes.

"Q. Taking into account, now, these other mortality factors which you have outlined?

"A. Yes."

"Mr. Coniff: If I may have a moment, Your Honor.

"I intend to wind up the redirect examination very shortly.

"Q. I believe in your testimony earlier this morning, in response to a question by counsel, you indicated that in your opinion it was necessary to totally prohibit net fishery, of the Indian net fishery up to the town of Puyallup in the Puyallup River. Could you explain your answer a little further?

"A. Well, I wouldn't limit it to the town of Puyallup. The important factor is that the fish at the mouth of the river, and in Commencement Bay, at that point, whether they are numerous or few, are all that you have to work with to get your spawning stock up the river. And the fish do mill. They are very vulnerable, and if you don't control the fishery absolutely at this point, then all of your other efforts will have been completely in vain. And as the fish do mill, closures aren't effective, it has been our finding in streams throughout the state of similar size, that we have had to shut the net fishery

down completely. And the evidence of the effect of such a fishery can be found in the Annual Report records." (A. 94, 95)

The fish making up the various gene pools or races are milling in the Bay and the lower river at this time and any net fishery subjects these species to a repeated take on the same fish. The effect is drastically different from a net fishery in Puget Sound as the fish are passing through a geographical area and are only subjected to fishing once (A. 101, 102, 103).

A sports or hook and line fishery at this point has no significant effect on the resource because of its inefficiency (A. 96, 97).

Petitions repeatedly point out that they take only 3% to 5% of the total fish catch from the Puyallup River runs (Pet. Br. 8, 11, 13, 14, 21, 22, 23, 28, 30, 32, 33, 35).

The difficulty with this approach is that the fishery takes place in an area that makes it biologically unsound to permit that effort in that place, i. e., a fishery on milling stocks. The same fish are subjected to a net fishery over and over again, as they are not moving out of the area.

The expert biologists, including the three most eminent fishery biologists in the Pacific Northwest (Dr. Van Cleve, Dr. Lauren Donaldson and Dr. J. A. R. Hamilton), uniformly condemned this practice, no matter who utilizes it (A. 101, 128, 130, 132, 133, 142, 161, 164, 176).

The regulatory system relates to all species of anadromous fish and is designed to protect them at all stages of their life cycle (A. 100-103, 137-141). Should one segment of the protective system break down or be rendered ineffective, the whole scheme is rendered useless and the resource endangered (A. 96).

In this case we are faced with an attempt by a certain group to establish an immunity from one segment of the regulatory scheme. Should the attack be successful, the entire conservation program will be destroyed, just as a weak link will destroy the purpose of a chain.

As an example, it has been recorded that a net fishery in the Fraser River, which is much larger than the Puyallup system, is capable of taking 98% of the migrating fish (A. 132).

SUMMARY OF ARGUMENT

I. An Indian Treaty Operates As A Grant of Right From the United States to the Indian Tribe and Therefore the "In Common With All Citizens of the Territory" Phase Must Be Given Literal Effect.

Aboriginal use and occupancy, sometimes referred to as "aboriginal title", does not create a compensable property right in Indians under the Fifth Amendment to the Constitution. Therefore, execution of a treaty with an Indian tribe does not operate as a recognition of any pre-existing right, but is a grant of right from the United States to the tribe.

Johnson v. McIntosh, 21 U.S. 543 (1823); *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955).

The right granted by the treaty to "fish in common with all citizens of the Territory" means that treaty Indians are possessed of only such rights as are all other citizens. The premise of *United States v. Winans*, 198 U.S. 371 (1905) that treaty was a recognition of "aboriginal title" is in error to this extent.

This conclusion is supported by the following language which appears in the treaty with the Yakima, 12 Stat. 951, in Article 3:

> "* * * is secured to them; as also the right, in common with citizens of the United States, to travel upon all public highways."

Absurd results on our streets and highways would obtain if the "in common" language were interpreted as a reservation of pre-existing sovereign right of the Indians as petitioners contend.

II. Assuming Arguendo that Treaty Indians Possess Special Rights to Fish Outside Their Reservation Boundaries, The "Reasonable and Necessary" Test Affords Recognition of Indian Rights and Yet Allows Conservation of the Anadromous Fishing Resource.

The test applied in the opinion below and in *State v. McCoy*, 63 Wn.2d 241, 387 P.2d 942 (1963) is the same rationale used by this court in *Tulee v. Washington*, 315 U.S. 681 (1942).

It allows the state to prohibit certain types of fishing practices when it can show the resource is being endangered by net fishing at critical times in certain areas.

The "indispensability test" of *Maison v. Confederated Tribes of Umatilla Indian Reservation*, 314 F.2d 169 (9th Cir. 1963) prohibits any conservation until the Indians have taken all but the last fish. It would effectively destroy the economic and recreational value of the resource. This standard is not workable in terms of the conservation needs of the resource because it leaves an Indian commercial fishery, using modern nylon monofilament nets, subject to no meaningful management or control.

III. Petitioners Possess No Immunity From Suit to Determine the Quantum of the Treaty Right.

The State of Washington has title to the fishery resource within its borders for the benefit of the public. Petitioners rely exclusively on cases granting tribal immunity for on-reservation internal tribal activities and they have no application to off-reservation actions that infringe on the state's property rights and governmental control.

IV. The Puyallup Indian Reservation Has Been Removed From Its Indian Country Status Pursuant to an Act of Congress, Thereby Severing the Guardian-Ward Relationship With the Federal Government.

Congress removed the trust status from the land within the original reservation in 1893. 12

Stat. 633. In 1904, Congress confirmed the removal of the alienation restrictions. 33 Stat. 565.

In *United States v. Kopp*, 110 Fed. 160 (D.C. Wash. 1901) the court recognized the land was no longer "Indian country." When reservation lands are sold under Congressional authority, any hunting or fishing rights pursuant to a treaty are terminated. *United States ex rel. Marks v. Brooks*, 32 F.Supp. 422 (D.C. Ind. 1940).

V. The Declaratory Judgment Procedure Affords the Best Vehicle For Disposition of the Questions Involved.

When there is doubt as to the meaning or applicability of a statute to a particular group or to a certain activity, a declaratory judgment action is best suited to answer complex questions. This court has recommended such a procedure in *Dombrowski v. Pfister*, 380 U.S. 479 (1965). Respondents have brought suit in their representative capacity as trustees of the fishery resource to protect public property from destruction. *People v. Monterey Fishing Co.*, 195 Cal. 548, 234 Pac. 398 (1925).

The essential requirement of a declaratory judgment action in an area involving criminal law are present here. This action involves (1) an actual controversy (2), the declaration will settle a substantial controversy and (3), all parties whose rights are affected are before the court.

ARGUMENT

I. An Indian Treaty Operates As A Grant of Right From The United States To The Indian Tribe and Therefore The "In Common With All Citizens of the Territory" Phrase Must Be Given Literal Effect.

The Constitution declares a treaty to be the supreme law of the land. U. S. Const., Art. 6. There is no question that the federal government may limit a state's police power by treaty. *Missouri v. Holland*, 252 U.S. 416 (1920).

Treaties with the various Indian tribes of the United States are distinguishable from international agreements to which the United States is a party because they deal with citizen-nationals wholly within the geographical and jurisdictional limits of the United States. 8 U.S.C. 1401 (a) (1958). The distinction between international agreements and Indian treaties was first drawn by Chief Justice Marshall in *Worcester v. Georgia*, 31 U.S. 515 (1832) which held that the Indian tribes were *dependent* sovereigns and were not subject to the laws of the United States or of a state within the boundaries of their treaty-created reservations unless expressly made so by Congress.

The federal government has, since 1871, been foreclosed by act of Congress from making new treaties with Indian tribes. 16 Stat. 544, 566; 25 U.S.C. 71. The notion of complete internal sovereignty of Indian tribes has undergone erosion due

to the continuing impact of the dominant Western-European civilization.

Under certain circumstances, state governments have been permitted to assume jurisdiction over Indian reservations for certain purposes. Public Law 280, 67 Stat. 588 (1953); 18 U.S.C. 1162; 28 U.S.C. 1360 (1958).

Indian reservations are something of an anomoly in our system of government. It would appear that they are "federal municipalities". *Wheeler-Howard Act*, 48 Stat. 984 (1934); 25 U.S.C. 461, et seq. The *Wheeler-Howard Act* authorizes the issuance of a constitution to Indians residing on a reservation for purposes of self-government. This same statute also authorizes the formation of business corporations by Indians on a reservation to engage in commercial enterprises. Thus, on any Indian reservation you can find three types of legal entities asserting rights of "self-government". There may exist (1) a municipal government with a constitution and by-laws, (2) a business corporation with a charter and by-laws, or (3) a continued legal entity succeeding to the legal rights of the aboriginal tribe. 65 Dec. of Dept. Int. 483. This court summarized the legal history of the relationship between the Indians and the states in *Village of Kake v. Egan*, 369 U.S. 60, 71-75 (1962). Added to the limitations upon reservation self-government outlined above is the fact that, under certain circumstances, the federal courts have jurisdiction to review tribal court

decisions relating to matters of internal self-government. *Colliflower v. Garland*, 342 F.2d 369 (9th Cir. 1965).

Granting the "police power" of the *Wheeler-Howard Act* organizations and the "tribe" over the reservation (subject only to the power of Congress to legislate in this area and the possibility of review in federal courts), off-reservation fishing and hunting is a matter extra-territorial. It must, therefore, be grounded in the survival of some *right* guaranteed to the aboriginal tribe or band of Indians whose rights have been succeeded to a presently existing tribe or band of Indians *other* than the municipal corporations or business corporations referred to above.

With this background in mind, the logical starting point in an analysis of the legal significance of Indian treaties is the relationship between the Indians and the federal government *prior to the execution of those treaties.*

At the outset, it must be granted that the Indians did not have the ability to understand the common-law concepts of private property. An Indian's "rights" were communal in nature with all other members of the tribe or band with which he was associated. *Journeycake v. Cherokee Nation*, 28 Ct.Cl. 281, 302 (1893) articulates this concept:

> "The distinctive characteristics of communal property is that every member of the community is an owner of it as such. He doesn't take as heir, or purchaser, or grantee; if he dies,

> right of property doesn't descend; if he removes from the community it expires; if he wishes to dispose of it he has nothing which he can convey; and yet he has a right of property in the land as perfect as that of any other person; and his children after him will enjoy all that he enjoyed, not as heirs but as communal owners."

When the United States began to preempt the Indians' aboriginal "use and occupancy" of the North American continent by permitting non-Indian settlement of the land, the question quite naturally arose as to the relative rights of the United States, or its grantees, and the Indians to the soil then aboriginally occupied by the tribes and bands.

Johnson v. McIntosh, 21 U.S. 543, 584 (1823) is the leading opinion of this Court discussing this question.

> "* * * Thus, all the nations of Europe, who have acquired territory on this continent, have asserted in themselves, and have recognized in others, the exclusive right of the discoverer to appropriate the lands occupied by the Indians. Have the American states rejected or adopted this principle?
>
> "By the treaty which concluded the war of our revolution, Great Britain relinquished all claim, not only to the government, but to the 'property and territorial rights of the United States,' whose boundaries were fixed in the second article. *By this treaty, the powers of government, and the right to soil, which had previously been in Great Britain passed definitively to these states.* We had before taken possession of them, by declaring independence; but neither the declaration of independence, nor the treaty confirming it, could give us more than that which we before possessed, or to which Great

> Britain was before entitled. It has never been doubted, that either the United States, or the several states, had a clear title to all the lands within the boundary lines described in the treaty, subject only to the Indian right of occupancy, and that the exclusive power to extinguish that right, was vested in that government which might constitutionally exercise it." (Emphasis supplied.)

The emphasized language takes on added meaning in light of Chief Justice Marshall's discussion of the patents by the Crown of Great Britain to the American colonies at page 579 of the opinion:

> "These various patents cannot be considered as nullities; nor can they be limited to a mere grant of the powers of government. *A charter intended to convey political power only, would never contain words expressly granting the land, the soil and the waters.*" (Emphasis supplied.)

By this statement, it is clear that it was this Court's position that the United States succeeded to all of the sovereign or governmental rights of Great Britain over the lands described in the treaty of peace ending the Revolutionary War. Even more significant is the statement that the words conveying only political powers "would never contain words expressly granting the land, the soil and the waters". Therefore, the grantor (Great Britain) must have conveyed to the grantee (the United States) both the governmental and proprietary rights to the lands ceded by the treaty of peace ending the Revolutionary War. It was expressly held that the United States has the power to make grants of soil occupied

by Indians to private individuals and, by patent, to convey clear title in fee simple absolute. This is inconsistent with the notion that the Indian possessed "title" to the lands which they aboriginally occupied which might give them the power to "sell their lands". This concept is clarified in *Johnson v. McIntosh, supra,* at pages 587-88:

> "The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. *They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest;* and gave also a right to such a degree of sovereignty as to the circumstances of the people would allow them to exercise. The power now possessed by the government of the United States to grant lands, resided, while we were colonies, in the crown or its grantees. The validity of the titles given by either has never been questioned in our courts. It has been exercised uniformly over territory in possession of the Indians. The existence of this power must negative the existence o(f) any right which may conflict with and control it. An absolute title to lands cannot exist, at the same time, in different persons, or in different governments. An absolute, must be an exclusive title, or at least a title which excludes all others not compatible with it. All our institutions recognize the absolute title of the crown, subject only to the Indian right of occupancy, and recognize the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians." (Emphasis supplied.)

The conclusion to be reached is that the United States possesses the power to grant to its citizens or any resident all right, title and interest to lands aboriginally occupied by Indian tribes. It is submitted that the Indians had no legal right to be compensated for their aboriginal use and occupancy. They could merely hope that political or moral considerations would lead the United States to grant them title to land. *The aboriginal use and occupancy of the Indian tribes amounts to nothing more than a common-law tenancy at sufferance, where their occupancy is not a technical trespass and, therefore, not adverse to the paramount title vested in the United States.*

Has the doctrine of *Johnson v. McIntosh, supra,* been rejected, modified or affirmed by subsequent judicial construction? *Tee-Hit-Ton Indians v. United States,* 348 U.S. 272 (1955) expressly adopted Marshall's rationale with the following language:

> "* * * (a) The nature of aboriginal Indian interest in land and the various rights as between the Indians and the United States dependent on such interest are far from novel as concerns our Indian inhabitants. It is well settled that in all the States of the Union the tribes who inhabited the lands of the States held claim to such lands after the coming of the white man, under what is sometimes termed original Indian title or permission from the whites to occupy. That description means mere possession not specifically recognized as ownership by Congress. After conquest they were permitted to occupy portions of territory over which they had previously exercised 'sovereignty,' as we use that term. This is not a property right but amounts to a right of occupancy

which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians." (page 279)

* * * *

"This leaves unimpaired the rule derived from *Johnson v. McIntosh* that the taking by the United States of unrecognized Indian title is not compensable under the Fifth Amendment." (pages 284-85)

* * * *

"No case in this Court has ever held that taking of Indian title or use ever held that taking of Indian title or use by Congress required compensation. The American people have compassion for the descendants of those Indians who were deprived of their homes and hunting grounds by the drive of civilization. They seek to have the Indians share the benefits of our society as citizens of this Nation. Generous provision has been willing made to allow tribes to recover for wrongs as a matter of grace, not because of legal liability. 60 Stat. 1050." (pages 281-82)

* * * *

"The line of cases adjudicating Indian rights on American soil leads to the conclusion that Indian occupancy, not specifically recognized as ownership by action authorized by Congress, may be extinguished by the Government without compensation." (pages 288-89)

In footnote 21 to its opinion, the Court added: "The Departments of Interior, Agriculture and Justice agree with this conclusion. See Committee Print

No. 12, Supplemental Reports dated January 11, 1954, on H. R. 1921, 83rd Cong., 2d Sess. * * *"[2]

From the foregoing, it is clear that a treaty between the United States and Indian tribes could not operate as a recognition or reservation of "aboriginal title".[3] Yet, it was precisely this notion that the Court relied upon, with no citation of authority to support its position, in *United States v. Winans*, 198 U.S. 371 (1905) to describe the nature of off-reservation fishing rights at "usual and accustomed" grounds under the Treaty with the Yakama, 12 Stat. 951 (1855).

At page 381, the Court stated:

> "* * * In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted."

Based on the assumption that the treaty operated as a reservation of "aboriginal title" the court went on to characterize the off-reservation fishing "right" as an easement at page 384:

> "* * * Nor does it (the treaty) restrain the State unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enables the right to be exercised."

The language of the Court in the *Winans* case, *supra*, is obviously inconsistent with the fundamental

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[2]The rationale of the *Tee-Hit-Ton case, supra*, has been followed by the lower federal courts. *Cowlitz Tribe of Indians v. City of Tacoma*, 253 F.2d 625 (9th Cir., 1957); *Prairie Band of Potawatomi Indians v. United States*, 165 F.Supp. 139 (Ct.Cl. 1958) and *Minnesota Chippewa Tribe v. United States*, 315 F.2d 906 (Ct. Cl. 1963).

[3]At least one commentator disagrees with the rationale of *Tee-Hit-Ton v. United States, supra*, and argues the "menagerie theory" of the legal relationship of the Indian tribes to the land. Cohen, *The Legal Conscience*, pp. 273, et seq.

theory of Indian title. *Johnson v. McIntosh, supra; Tee-Hit-Ton Indians v. United States, supra.*

Unfortunately, characterizing the "usual and accustomed" ground provision of the treaties as a common-law easement by the judiciary subsequent to the *Winans* decision, *supra*, has occurred without regard to the fact that its rationale of "original Indian title" has been completely rejected. *Maison v. Confederated Tribes of Umatilla Indian Reservation*, 314 F.2d 169 (9th Cir. 1963) illustrates the expectable results if the *Winans* doctrine is carried to its logical and ultimate conclusion. In this case, the Umatilla Indians sought a declaratory judgment of their off-reservation fishing rights on the Columbia River and its tributaries and an injunction against the application of state conservation laws and regulations by the Oregon State Game Commission. The Circuit Court of Appeals upheld the issuance of the injunction holding that the state had failed to meet the burden of proving that the application of its conservation laws was "indispensable" to the preservation of the fishery resource. To support this conclusion the court relied on *United States v. Winans, supra, Tulee v. Washington*, 315 U.S. 681 (1942) and *Makah Indian Tribe v. Schoettler*, 192 F.2d 224 (9th Cir. 1951). It was the opinion of the court that the Indians "reserved" their aboriginal rights to the fishery resource when they "granted" the lands they aboriginally used and occupied to the United States by execution of a treaty. The only qualification to this theory is that the "citizens of

the Territory" might share in the enjoyment of the resource with the Indians. By placing the Indians in the position of "grantor", the non-Indians must thereby be relegated to the position of mere licensees. The court supported this theory by its interpretation of the dicta in the *Tulee* case, *supra*,

> "that, while the treaty leaves the state with power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish, it forecloses the state from charging the Indians a fee of the kind in question here." (315 U.S. at 684)

The court stated at page 172 of the *Umatilla* opinion, *supra:*

> "Thus, in both the *Tulee* and *Makah* cases it was held that the Indian's right to fish is qualified by the state's right to regulate such fishing when necessary for conservation. But, to establish necessity the state must prove two facts: *first*, that there is a need to limit the taking of fish, *second*, that the particular regulation sought to be imposed is 'indispensable' to the accomplishment of the needed limitation."[4]

In order to meet this burden of proof, the state must show that there are no alternative means of preserving the fishery resource. This means that the state would have to show a total closure of both sport and commercial non-Indian fisheries *and* a continuing decline in the fishery population to such an

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[4]Webster's Third International Dictionary, unabridged, 3rd Ed., 1963, defines "indispensable" as follows:

"1. that cannot be set aside or neglected or disregarded; 2. that cannot be dispensed with: that is absolutely necessary or requisite or essential: that cannot be done without."

extent that the very preservation of the resource itself was at stake before it could apply its conservation regulations to a treaty Indian fishing at his "usual and accustomed" fishing grounds. The Indians would be in the advantageous position of having a prior vested right to the entire anadromous fishery resources of the Pacific Northwest because the "usual and accustomed" language is found in all of the Indian treaties executed in the states of Washington, Oregon, and Idaho.[5] State regulations could only be justified on the basis of protection of Indian fishing.

Tulee v. Washington, supra, does not support the position taken by the court in the *Umatilla* decision for two reasons. First, *Tulee* uncritically accepts the rationale of the *Winans* decision contrary to the theory of aboriginal title as held by this Court in *Johnson v. McIntosh, supra,* and reaffirmed by this court in *Tee-Hit-Ton Indians v. United States, supra.* Second, *Tulee* held that it was not proper for the state to charge an Indian a fee for a fishing license where the revenues so derived were to be used for the general support of state government rather than being related to a conservation program. The

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[5]This "usual and accustomed" language, without significant variation, is found in the following treaties: Treaty with the Nisqually et al., Nov. 1854, 10 Stat. 1132; Treaty with D'wamish, Suquamish and other Indians, Jan. 22, 1855, 12 Stat. 927; Treaty with S'Klallam Indians, Jan. 26, 1855, 12 Stat. 1933; Treaty with Makah Indians, Jan. 31, 1855, 12 Stat. 939; Treaty with Walla Walla, Cayuses, and Umatilla Indians, June 9, 1855, 12 Stat. 945; Treaty with Yakima Indians, June 9, 1855, 12 Stat. 951; Treaty with Nez Perce Indians, June 11, 1855, 12 Stat. 957; Treaty with Tribes of Indians of Middle Oregon, June 24, 1855, 12 Stat. 963; Treaty with Quinaielt and Quillehute Indians, July 1, 1855, 12 Stat. 971; Treaty with Flathead, Kootnay and Upper Pend d'Oreilles Indians, July 16, 1855, 12 Stat. 975.

language relied upon by petitioners (necessary for conservation) is merely dicta and certainly unnecessary to the holding of the case.

The adoption of the *Winans* philosophy of original Indian title and the imposition of the burden of proving "indispensability" upon the state by the Ninth Circuit Court of Appeals is directly inconsistent with this Court's decision in *New York ex rel. Kennedy v. Becker*, 241 U.S. 556, 563-64 (1916):

> "* * * We do not think that it is a proper construction of the reservation in the conveyance to regard it as an attempt either to reserve sovereign prerogative or so to divide the inherent power of preservation as to make its competent exercise impossible. Rather are we of the opinion that the clause is fully satisfied by considering it a reservation of a privilege of fishing and hunting upon the granted lands in common with the grantees, and others to whom the privilege might be extended, but subject nevertheless to that necessary power of appropriate regulation, as to all those privileged, which inhered in the sovereignty of the State over the lands where the privilege was exercised. "* * * We also assume that these Indians are wards of the United States, under the care of an Indian agent, but this fact does not derogate from the authority of the State, in a case like the present, to enforce its laws at the locus in quo. *Ward v. Race Horse, supra; United States v. Winans, supra.*"

Ward v. Race Horse, 163 U.S. 504 (1896) likewise upholds the proposition that a state possesses the sovereign or governmental authority to regulate Indian hunting and fishing outside the boundaries of an Indian reservation. Significantly this case was cited

with approval by this Court in *Village of Kake v. Egan*, 369 U.S. 60, 75-76 (1962):

> "Even where reserved by federal treaties, off-reservation hunting and fishing rights have been held subject to state regulation, *Ward v. Race Horse*, 163 U.S. 504; *Tulee v. Washington*, 315 U.S. 681, in contrast to holdings by state and federal courts that Washington could not apply the laws enforced in *Tulee* to fishing within a reservation, *Pioneer Packing Co. v. Winslow*, 159 Wash. 655, 294 P. 557; *Moore v. United States*, 157 F.2d 760, 765 (C.A. 9th Cir.). See *State v. Cooney*, 77 Minn. 518, 80 N.W. 696.
>
> "True, in *Tulee* the right conferred was to fish in common with others, while appellants here claim exclusive rights. But state regulation of off-reservation fishing certainly does not impinge on treaty-protected reservation self-government, the factor found decisive in *Williams v. Lee*. Nor have appellants any fishing rights derived from federal laws. This Court has never held that States lack power to regulate the exercise of aboriginal Indian rights, such as claimed here, or of those based on occupancy. Because of the migratory habits of salmon, fish traps at Kake and Angoon are no merely local matter."

The *Kake* case, *supra*, establishes that the state (1) may apply its conservation laws to Indians who are beneficiaries of a treaty insofar as their off-reservation fishing activities are concerned, and, (2) may apply its conservation laws to Indians who claim special privileges based on aboriginal use and occupancy or "original Indian title".

The burden of proving "indispensability" as articulated by the Ninth Circuit Court of Appeals in

the *Umatilla* case, *supra*, amounts to a presumption that state conservation laws are unconstitutional in their application to the appellants who fish commercially with efficient, modern gear at their "usual and accustomed" grounds with such a devastating effect upon the fishery resource as shown by this record. This notion is not only inconsistent with the cases discussed herein, but also with the fundamental presumption that all state laws are valid so long as they are not constitutionally objectionable. A serious breakdown in law-enforcement has been experienced and may be expected to continue so long as the nature of "original Indian title" is misunderstood. The anadromous fishery resources would be placed in jeopardy.

II. Assuming Arguendo, That Treaty Indians Possess Special Rights to Fish Outside Their Reservation Boundaries, the "Reasonable and Necessary" Test Affords Recognition of Indian Rights and Yet Allows Conservation of the Anadromous Fishery Resource.

Without abandoning what respondents believe to be the proper interpretation of the treaty, we submit that the only workable standard to be applied is that used by the court below if Indians are held to have a qualified immunity from state conservation laws.

The Washington Supreme Court quoted with approval from *Tulee v. Washington*, 315 U.S. 681 (1942):

> "* * * The appellant (Tulee), on the other hand, claims that the treaty gives him unrestricted right to fish in the 'usual and accustomed places,' free from state regulation of any kind. We think the state's construction of the treaty is too narrow and the appellant's too broad; that, while the treaty leaves the state with power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish, it forecloses the state from charging the Indians a fee of the kind in question here."

Further, the court quoted with approval from *Organized Village of Kake v. Egan*, 369 U.S. 69 (1960). *State v. McCoy*, 63 Wn.2d 421, 387 P.2d 942 (1963).

In the instant case and in *Department of Game v. Nugent Kautz*, October Term, 1967, Docket No. 319, the Washington Supreme Court followed the *McCoy* standard.

This concept permits unified management of the resource and yet grants to the Indians a "special right" not accorded to other citizens.[6]

The holding of the Idaho Supreme Court in *State v. Arthur*, 74 Idaho 251, 261 P.2d 135 (1953), Cert. denied, 347 U.S. 937 (1954) that a state has no power to regulate off-reservation hunting (and fishing) is demonstrably unsound, as this court has never overruled *Ward v. Race Horse*, 163 U.S. 504

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[6]It is interesting to note that two judges of the *McCoy* court would limit the Indian "right" to the use of aboriginal fishing equipment. *State v. McCoy*, 63 Wn.2d 421 at 439 (1963).

(1896) and *New York ex rel. Kennedy v. Becker*, 241 U.S. 556 (1916)[7].

Maison v. Confederated Tribes of the Umatilla Indian Reservation, 314 F.2d 169 (9th Cir. 1963) enunciates an unsound rule from the standpoint of conservation of anadromous fishery resource.

Petitioners make a point of arguing that since unlawful netting activities result in only three to five percent of the total catch of salmon and steelhead, their netting activities should not be prohibited (Pet. Br. 21 et seq.).

The United States makes a similar argument in the brief (Br. *Amicus* of U.S. 10, 11, 12), arguing that on the face of the statistics, a prohibition of net fishing in Commencement Bay and the Puyallup River seems unreasonable.

While such statements seems to have credibility at first blush, they reveal a basic ignorance of the biological facts of life. The unanimous opinions of respondent's expert witnesses was that no net fishing should be permitted in these areas. The reasons for these views are that a net fishing in these particular areas is invidious because the anadromous fish, once having arrived at the mouth of the river cease to move from it. They mill and hold in the bay. A net fishery fishes the same stocks of fish over and over again (A. 94-95). It is unsound for anyone to fish with nets in these areas, be they Indians or

[7]This was recognized by a commentator in Hobbs, *"Indian Hunting and Fishing Rights"* 32 George Washington L. Rev. 504 (1964).

not. And, fundamentally, this is a decision that must be left to those trained in fishery science, for they alone are equipped by education and experience to make such decisions. There is no conflict in the opinions of the experts. The trial court and the court below were faced with testimony and evidence from the most prominent men in the field that it was reasonable and necessary that all net fishing be prohibited. Petitioners produced not a single witness to challenge respondent's evidence. This Court should rely on the uncontradicted opinions of the witnesses offered by respondents and not substitute its judgment over theirs.

Respondents submit that the evidence shows conclusively that the biological answer to petitioners' and the United States' inquiry "Is not it permissible to allow some net fishing?" is no.

III. Petitioners Possess No Immunity From Suit to Determine the Quantum of the Treaty Right.

Reliance is placed by petitioners upon a line of cases beginning with *Thebo v. Choctaw Tribe of Indians*, 66 Fed. 372 (8th Cir. 1895) and culminating with *Haile v. Saunooke*, 246 F.2d 293 (4th Cir. 1957). See also: *Turner v. United States*, 248 U.S. 354 (1919) and *United States v. United Fidelity and Guaranty Co.*, 309 U.S. 506 (1940). (Pet. Br. 48-51.)

Each of the cases cited above involved an attempt to reach property held in trust by the federal government for the benefit of the particular tribe

involved. The courts have indicated that the Indian tribes have a residual "sovereign immunity" from any suit, in law or equity, designed to reach property or property rights possessed by the tribe which is still under the active superintendence of the federal government (i.e., under a trust restriction against alienation). The right of petitioners to claim a vested property right to the anadromous fishery resources and wildlife resources of the State of Washington (outside reservation boundaries) is the very issue of this lawsuit. Respondents assert an ownership in these natural resources for the benefit of the entire public of the State of Washington. *Geer v. Connecticut*, 161 U.S. 519 (1896); *People v. Monterey Fishing Co.*, 195 Cal. 548, 234 Pac. 398 (1925); *New York ex rel. Kennedy v. Becker*, 241 U.S. 556 (1916); *Tulee v. Washington*, 315 U.S. 681 (1942); *Village of Kake v. Egan*, 369 U.S. 60 (1962); *State v. McCoy*, 63 Wn.2d 421, 387 P.2d 942 (1963). Respondents assert the right to regulate the fishing of petitioners equally with all other citizens outside presently existing Indian reservation boundaries. It is a matter extra-territorial to areas of federal jurisdiction or superintendence. The *rationale* of this line of cases should not be applied to off-reservation assertions of ownership on the part of Indians or Indian tribes.

Obviously, any person charged criminally with a violation of a state conservation regulation outside reservation boundaries could defend himself by bringing in a "chief" of a "tribe" establishing his

membership therein, and then successfully claim "sovereign immunity" from suit. The term "Indian" or "Indian tribe" possesses no such magic. The cases relied upon by petitioners are distinguishable from the instant case.

IV. The Puyallup Indian Reservation Has Been Removed From Its Indian Country Status Pursuant to an Act of Congress, Thereby Severing the Guardian-Ward Relationship With the Federal Government.

Subsequent to the execution and ratification of the Treaty of Medicine Creek, 10 Stat. 1132, the old Puyallup Indian Reservation was established by executive order. The boundaries were adjusted by President Grant on September 6, 1873, 1 Kappler 922, 923. In 1888 and 1893, Congress granted railroad rights-of-way through the reservation, 25 Stat. 350; 27 Stat. 468. Later in 1893 Congress enacted the Puyallup Allotment Act, 27 Stat. 633, which established a commission to allot the lands of the reservation to the Indians in severalty and placed a ten year trust period from the date of passage of the act (March 3, 1893), during which time the allottees would not have the power to alienate their individual tracts. In 1897 Congress provided that a commissioner be appointed to superintend the sale of allotments within the boundaries of the Puyallup Indian Reservation and to carry out the purposes of the Puyallup Allotment Act, 30 Stat. 87. A question arose concerning the power of the Indian allottees of the Puyallup Reservation to convey complete fee

simple title to their allotted lands. Congress then confirmed the removal of the trust restrictions against alienation of the allotted lands by enacting 33 Stat. 565 (1904). This act reads:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act of Congress approved March third, eighteen hundred and ninety-three (Twenty-seven Statutes, page six hundred and thirty-three), authorizing the sale of the Puyallup allotted lands, with restriction upon alienation "for a period of ten years from the date of the passage" thereof, shall be taken and construed as having expressed the consent of the United States to the removal of restriction upon alienation by said Puyallup Indians to their allotted lands from and after the expiration of said period shall be given effect of having been made without any restrictions upon the power of the allottee to alienate his land.

Conclusive proof of Congressional intent to remove the old Puyallup Reservation from its status as "Indian Country" is shown by House Committee Report No. 301, 58th Congress, Second Session (1904). The report states, in relevant part:

> This bill (H.R. 5767) is designed to give the consent of Congress to the removal of the restrictions heretofore placed on the sale of Puyallup allotted lands, and to permit said allottees to lease, encumber, grant, alien, sell and convey said lands as freely as any other person may sell and convey real estate. (p. 1)
>
> Should it become a law, it would certainly be clear to all concerned that the Government thereby gives its absolute, full, and complete consent to the removal of the restrictions mentioned. (p. 5)

The state of Washington accepted absolute and complete jurisdiction over the lands in question. RCW 64.20.010, et seq. Both state and federal courts have given effect to the legislation set forth above. In *United States v. Kopp*, 110 Fed. 160 (D.C. Wash. 1901), the court dismissed a federal charge against the defendant for selling liquor to a Puyallup Indian. The court distinguished the earlier case of *Eells v. Ross*, 64 Fed. 417 (9th Cir. 1894) and held:

> * * * Since the decision of the circuit court of appeals in that case the conditions have been materially changed by actual sales of a considerable part of the reservation under the provisions of the act of 1893 above referred to. It is certain that the purchasers from the commissioners appointed pursuant to that statute cannot be lawfully evicted from their property, and *I hold that by the subdivision and alienation of a considerable part of the patented land the reservation has been abolished, except the part retained as a site for an Indian training school, and use of the government for other purposes.* * * * (Emphasis supplied.) (at p. 165)

The state may tax the lands situated within the boundaries of the old Puyallup Indian Reservation. *Goudy v. Meath*, 38 Wash. 126, 80 Pac. 295 (1905). Also, the "Ten Major Crimes Act" (23 Stat. 385) no longer applies to these lands. *State v. Smokalem*, 37 Wash. 91, 79 Pac. 603 (1905). Accord: 27 Am. Jur., Indians, § 36. The lands in question are no longer set aside for the use of the petitioners, as Indians, and are no longer under the active superin-

tendence of the federal government. The old Puyallup Indian Reservation does not occupy the status of "Indian Country". *United States v. McGowan*, 302 U.S. 535 (1938); *United States v. Pelican*, 232 U.S. 442 (1914) and *Healing v. Jones*, 210 F. Supp. 125 (D.C. Ariz. 1962).

All vestiges of federal jurisdiction have vanished.

Where reservation lands are sold pursuant to an act of Congress, as in this case, there are no "retained" hunting or fishing rights by virtue of a treaty. *United States ex rel. Marks v. Brooks*, 32 F. Supp. 422 (D.C. Ind. 1940) held that the guardian-ward relationship between the federal government and the Miami Tribe of Indians had been severed by virtue of the allotment and sale of the reservation lands. Even though the Treaty of Greenville, 7 Stat. 49 (1795) reserved hunting rights to the Miami Tribe, the court held that Congress had terminated hunting rights by virtue of the sale of reservation lands—even though the hunting provision of the treaty was not expressly dealt with in the termination act.

Klamath and Modoc Tribes v. Maison, 338 F. 2d 620 (9th Cir. 1964) rejected the argument that the Klamath Termination Act, 25 U.S.C. 564—564w, did not terminate "treaty-reserved" hunting or fishing rights within the old Klamath Reservation boundaries. The court stated at page 623 of its opinion:

> * * * By treaty the rights of the Indians were limited to the lands of the reservation. By the Klamath Termination Act, supra, it was provided that to the extent necessary to meet the requirements of the Act, lands should be taken from Indian ownership and sold. Such lands clearly were thereby severed from the reservation and thus released from any restrictions imposed upon them as reservation lands by the treaty.

State v. Sanapaw, 21 Wis. 2d 377, 124 N.W. 2d 41 (1963) similarly construed the *Menominee Termination Act*, 25 U.S.C. 891-902. See also: *State v. Big Sheep*, 243 Pac. 1067 (Mont. 1926).

In the *Klamath* and *Sanapaw* cases, *supra*, reliance was placed on House Concurrent Resolution 108, 83rd Congress, 1st Session, which states, in relevant part:

> Whereas, it is the policy of Congress as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship; and
>
> Whereas, the Indians within the territorial limits of the United States should assume their full responsibilities as American citizens * * *

The Senate Committee on Interior and Insular Affairs, Executive Report No. 1, 89th Congress, 2nd Session (April 8, 1966) severely chastised the Department of Interior, and particularly the Bureau of Indian Affairs, for the failure of these govern-

mental agencies to implement the will of Congress that the American Indian take his rightful place, as a responsible citizen, in our society.

It is submitted that this court should interpret the Puyallup termination legislation in a manner consistent with the intent of Congress as the courts in the *Klamath* and *Sanapaw* cases, *supra*, have done. The umbilical cord between the federal government and these petitioners has been legally severed.

V. The Declaratory Judgment Procedure Affords the Best Vehicle For Disposition of the Questions Involved.

This action was commenced pursuant to the Uniform Declaratory Judgments Act, Chapter 7.24 RCW. The trial court's jurisdiction was founded on RCW 7.24.010:

> "Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. An action or proceeding shall not be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect and such declarations shall have the force and effect of a final judgment or decree."

This form of action was utilized to avoid a multiplicity of criminal actions and their attendant problems of arrest in solving a complex question. As the court below pointed out, criminal prosecutions,

> "* * * seems to us the unnecessarily hard way of determining whether they have immu-

nuity from certain fishing regulations." (A. 41)

Further, the court said:

> "Since the Indians who claim immunity from these regulations claim them under the treaties between the United States and various Indian tribes, it seems to us that the state departments acted wisely in seeking an interpretation of those treaties and a delineation of the rights of the members of the different tribes in a series of actions under the Uniform Declaratory Judgments Act." (A, 41)

It is now accepted that a declaratory judgment action will lie in cases involving criminal matters if: (1), there is present an actual and justiciable controversy; (2), the case is one in which the declaration will settle the question and terminate the controversy; and (3), all the parties whose rights are affected are before the court. 10 ALR 3d 733.

Those criteria are met in this case where: (1), the petitioners had been fishing openly in violation of state conservation laws for ten years (A. 35) and respondents are charged with enforcing those selfsame statutes; (2), the complaint specifically seeks a declaration of the immunity, if any, petitioners have from valid conservation laws (A. 6); and (3), those claiming special immunities and the agencies with the responsibility for protecting the anadromous fishery resource are the parties to the action (A. 5, 6, 9, 10).

This Court has suggested the procedure enlisted here. See *Dombrowski v. Pfister*, 380 U.S. 479 at 491 (1965) wherein it was suggested that Louisiana officials might overcome a vagueness at-

tack on a statute by seeking a declaratory judgment as to its construction (implicit, of course, would be its application to the litigants therein).

This Court stated:

> "These are circumstances under which courts properly make exceptions to the general rule that equity will not interfere with the criminal processes, by entertaining actions for injunction or declaratory relief in advance of criminal prosecution. *Zemel v. Rusk*, 381 U.S. 1 at 19 (1965)."

The judgment in this action does not enjoin the commission of a crime itself, but declares that petitioners must abide by the reasonable and necessary conservation laws, rules and regulations (A. 38, 54).

The evidentiary background in this case shows that unless enjoined, petitioners' activities would destroy the anadromous fishery resource in the Puyallup River.

Title to and the property in all fish within the waters of the state are vested in the State of Washington and held by it in trust for the people of the state. *Geer v. Connecticut*, 161 U.S. 519 (1896).

People v. Monterey Fishing Co., 195 Cal. 548, 234 Pac. 398 (1925) presents an identical fact pattern to the instant case. It involved an injunctive action brought by California on behalf of its citizens to protect the sardine fishery from an unlawful depletion by the defendants. The court held that an injunction should issue in order to protect the fishery resource for future generations and, further,

specifically found that enforcement of criminal statutes would not provide an adequate remedy at law.

> "The circumstance that it may be prosecuted criminally for a violation of the penal provisions of the statute affords no adequate remedy for the civil wrong, which consists of an invasion of plaintiff's property." (p. 405.)

VI. The United States Has No Authority to Regulate Off-Reservation Indian Fishing.

The argument made by the United States (*Amicus* Br. 10) off-reservation Indian fisheries are subject to the regulatory authority of the Department of Interior is spurious.

The position taken in the brief currently before this court articulates a proposition of law which is demonstrably untenable. The position taken has proven to be historically attractive to the Department of Interior insofar as it would expand its jurisdiction (i.e., regulatory authority) of the Bureau of Indian Affairs.

The notion that the Secretary of Interior (Bureau of Indian Affairs) possesses the authority to regulate off-reservation Indian fishing and hunting activities in derogation of an exercise of the state police power to protect its own natural resources (*Geer v. Connecticut*, 161 U.S. 519 (1896)), was first rejected by the United States Supreme Court in *Ward v. Race Horse*, 163 U.S. 504 (1896). This same contention was again presented to the Supreme Court in *New York ex rel. Kennedy v. Becker*, 241 U.S. 556 (1916). In rejecting the argument ad-

vanced on behalf of the federal government, the court stated at page 563:

> * * * We are unable to take this view. It is said that the State would regulate the whites and that the Indian tribe would regulate its members, but if neither could exercise authority with respect to the other at the *locus in quo*, either would be free to destroy the subject of the power. Such a duality of sovereignty instead of maintaining in each the essential power of preservation would in fact deny it to both.

A comparable argument was raised on behalf of the Bureau of Indian Affairs in *Mason v. Sams*, 5 F. 2d 255 (D.C. Wash. 1925). In this case the Department of Justice advanced the proposition that the federal government could regulate on-reservation fishing activities by members of the Quinault Tribe of Indians. The court rejected this contention.

United States v. Cutler, 37 F. Supp. 724 (D.C. Ida. 1941), held that the Department of Interior could not enforce its regulations adopted pursuant to the Migratory Bird Treaty, 16 U.S.C. 703, et seq., to an Indian hunting within the boundaries of a duly constituted Indian reservation.

Again, as late as 1962, we find the federal government asserting that the Department of Interior possesses regulatory authority to control Indian fishing without an act of Congress authorizing it to do so. In *Village of Kake v. Egan*, 369 U.S. 60 (1962), it was again asserted in the briefs filed on behalf of the federal government that Section 4 of the Alaska Statehood Act, 72 Stat. 339, should be interpreted

to mean that the reservation of jurisdiction over Indian property (including fishing rights) thereby ousted the state of Alaska from its jurisdiction to regulate fishing by aborigines within its boundaries. This Court again rejected the argument advanced by the federal government and commented at page 64:

> The United States wisely abandoned its position that Alaska has disclaimed the power to legislate with respect to any fishing activities of Indians in the State. * * * *

John A. Carver, Jr., Undersecretary of the Department of Interior, promulgated the proposed regulations of the Department of Interior, Bureau of Indian Affairs, pertaining to off-reservation treaty fishing on July 5, 1965. *It is interesting to note that Mr. John A. Carver, Jr., stated to the Senate Committee on Interior and Insular Affairs on August 5, 1964, that the Department of Interior, Bureau of Indian Affairs, did not possess the authority to regulate off-reservation Indian fishing absent Congressional action.* Hearings before the Subcommittee on Indian Affairs of the Comm. on Interior and Insular Affairs. U. S. Senate, 88th Congress, 2d Session, S.J. Res. 170 and S. J. Res. 171, August 5-6, 1964.

The federal government can point to no statute which would permit it to invade this area of historic state police power activity. Without such Congressional action, the Department of Interior, Bureau of Indian Affairs, cannot claim jurisdiction authority over Indians outside Indian reservations

SUMMARY

Respondents submit that the Treaty of Medicine Creek should be interpreted in the light of its historical context. In 1855 the Indian of Puget Sound occupied an inferior legal status. He was not a citizen. He could not vote. He could not sue or be sued in court of law without Congressional action (e.g., 25 Stat. 350; 27 Stat. 468). To put it bluntly, in 1855 Puget Sound Indians could be legally discriminated against. Respondents submit that the "usual and accustomed" provision of the Treaty of Medicine Creek should be read in its entirety in light of its historical context. The treaty provision in question provides that the Indians shall have a right to fish and hunt in their usual and accustomed areas "in common with the citizens of the Territory". Respondents submit that the "in common" language of the treaty was meant to assure that the Indians would not be foreclosed from their customary sources of food during the transitional period in which they would become civilized beings. It was hoped by Congress that the Indians would be integrated into the agrarian level of economy within twenty to thirty years of the date of execution of the treaty. Unfortunately, for the Indian, this has not occurred.

The same reasoning applies with greater force when Article 3 of the Treaty with the Yakima is considered. The right to go upon the public highways "in common with citizens of the United States" cer-

tainly could not be interpreted to give the Yakima Indians a right to disregard traffic regulations which, of course, were not considered by anyone in 1855. What was intended was that the Indians were not to be discriminated against in their use of public highways.

The same "in common" language of the treaties also refers to gathering roots and berries. Surely it was not intended that Indians possess a treaty right to go upon farms outside their reservations to gather roots and berries in violation of state laws.

CONCLUSION

Respondents submit that petitioners are not legally entitled to immunity from valid state conservation laws and regulations outside reservation boundaries.

Alternatively, respondents submit that the "reasonable and necessary" standard adopted by the court below affords the Indians a special right and yet gives the fishery resource a means of being protected and preserved from destructive fishing practices.

The injunction issued by the lower court should be affirmed.

Respectfully submitted,

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